



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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May 16, 2012

Via electronic mail

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Mr. Kim Janssen
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RE: FOIA Request for Review - 2012 PAC 18365

Dear Ms. Abraham and Mr. Janssen:

The Public Access Counselor has received a Request for Review submitted by Mr. Kim Janssen, Staff Reporter, *Chicago Sun-Times*, pursuant to section 9.5(a) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). This office has considered the Request for Review as well as the responsive correspondence and records submitted to this office by the Office of the Cook County Sheriff (Sheriff's Office).

BACKGROUND

On December 22, 2011, Mr. Janssen submitted a FOIA request to the Sheriff's Office seeking "copies of all reports, documents, video and audio recordings relating to the investigation of convicted panderer Kimberly Miniea[.]"¹ The Sheriff's Office responded to Mr.

¹E-mail from Kim Janssen, Staff Reporter, *Chicago Sun-Times*, to CCSO FOIA officer (December 22, 2011).

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Janssen's request on January 10, 2012, furnishing him with a copy of the Cook County Sheriff's Police Department Motor Vehicle Incident Report, after redacting private information from the report pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)). The Sheriff's Office denied disclosure of the remaining responsive records, which include audiotapes and investigatory records, pursuant to section 7(1)(c) and 7(1)(d)(v) of FOIA (5 ILCS 140/7(1)(c), (d)(v) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)).²

Section 7(1)(c) of FOIA exempts from inspection and copying:

Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.

"Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

Section 7(1)(d)(v) exempts from inspection and copying information that would "disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]"

²Letter from Ms. Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff, to Matthew C. Rogina, Assistant Attorney General, Public Access Bureau (January 10, 2012).

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Mr. Janssen submitted his Request for Review of the Sheriff's Office's partial denial to the Public Access Bureau on January 31, 2012.³ On February 6, 2012, this office forwarded a copy of the Request for Review to the Sheriff's Office and asked for an explanation of the applicability of the asserted exemptions.⁴ The Sheriff's Office responded on February 16, 2012, asserting that the information contained in the withheld records was obtained pursuant to court ordered eavesdropping (commonly referred to as "overhears") and is exempt from disclosure under section 7(1)(a) of FOIA. Section 7(1)(a) allows a public body to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law" (5 ILCS 140/7(1)(a) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011). The Sheriff's Office asserted that section 108A-2 and section 108A-7 of the Illinois Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/108A-2, 7) (West 2010)) prohibit disclosure of the records.⁵ The Sheriff's Office's letter, states, in pertinent part:

[T]hese reports contain specific accounts and records which were obtained through court-approved Confidential Overhears. These Orders were obtained in accordance with 725 ILCS 5/108A-1 et seq. 725 ILCS 5/108A-2 specifically addresses the authorized disclosure or use of the information obtained through these Orders, and therefore the [Sheriff's Office] is not allowed to disclose these documents pursuant to the Illinois Code of Criminal Procedure.

Section 108A-2(a) limits the disclosure of information that is obtained through court-approved overhears to "[a]ny law enforcement officer who, by any means authorized in this Article, has obtained knowledge of the contents of any conversation overheard or recorded by use of an eavesdropping device or evidence derived therefrom[.]" 725 ILCS 5/108A-2(a) (West 2010). Section 108A-2(b) provides that "[a]ny investigative or law enforcement officer

³E-mail from Kim Janssen, Staff Reporter, *Chicago Sun-Times*, to Paccess@atg.state.il.us (January 31, 2012).

⁴Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff (February 6, 2012).

⁵Letter from to Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff to Matthew C. Rogina, Assistant Attorney General, Public Access Bureau (February 16, 2012).

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who, by any means authorized in this Article, has obtained knowledge of the contents of any conversation overheard or recorded use of an eavesdropping device or evidence derived therefrom, may use the contents to the extent such use is appropriate to the proper performance of his official duties." 725 ILCS 5/108A-2(b) (West 2010). Finally, section 108A-7 provides:

[R]ecordings shall be sealed under the instructions of the judge and custody shall be where he orders. Such recordings shall not be destroyed except upon order of the judge hearing the application and in any event shall be kept for 10 years if not destroyed upon his order. 725 ILCS 5/108A-7 (West 2010).

This office forwarded a copy of the Sheriff's Office's response to Mr. Janssen on February 16, 2012.⁶ To date, Mr. Janssen has not responded. On April 3, 2012, the Sheriff's Office responded and supplied us with the investigatory records and audio recordings that are responsive to Mr. Janssen's request.

DETERMINATION

The issue for our review is whether records generated pursuant to a court ordered overhear are exempt from disclosure pursuant to section 7(1)(a) of FOIA because sections 108A-2 and 108A-7 of the Code of Criminal Procedure prohibit the disclosure of such records generally.

The Illinois Appellate Court has addressed the issue of the public's right to access records that are generated pursuant to an overhear. In *In re Consensual Overhear*, 323 IllApp.3d 236 (2nd Dist. 2001), the *Northwest Herald (Herald)* submitted a FOIA request seeking an application for an overhear, the order authorizing the overhear, documents indicating that the subject was notified by the judge, and other related documents that were under seal. *Consensual Overhear*, 323 IllApp.3d at 236. The Illinois Appellate Court concluded that the *Herald* did not have standing to access the court records and that the statutes governing confidential overhears limit access to the documents to individuals who are related to the case, such as the prosecuting attorneys, law enforcement officers, investigative officers, parties to the overhears, and their attorneys. *Consensual Overhear*, 323 IllApp.3d at 241. The Court concluded that the language

⁶Letter from Mr. Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Kim Janssen, Staff Reporter, *Chicago Sun-Times* (February 16, 2011).

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in the Code of Criminal Procedure restricting access to records that are generated pursuant to an overhear reflects the legislature's intention to keep those records confidential:

Reading sections 108A-7 and 108A-8 together, we conclude that only a party to the application or the recorded conversation or his attorney may file a motion to inspect the *applications, orders, recorded conversation, or evidence derived therefrom* and the judge may grant the application to disclose upon a showing of good cause. Nowhere in the provisions does the legislature contemplate access by a nonparty to the overhear. If the legislature intended to give the press or the public access to this information, it specifically would have stated so.

* * *

The proceeding in which the government seeks the court's permission to implement an eavesdropping device is not the type of proceeding that historically has been open to the public. In fact, the very nature of the proceedings in the present matter guards against disclosure of the type petitioner seeks. We find no constitutional or common-law presumption of a right of access to the documents here. (Emphasis added.) *Consensual Overhear*, 323 Ill. App.3d at 240-242.

This office concludes that the requested records presently under court seal, consisting of the audiotapes, transcripts of the audiotapes, and records that reflect the contents of the overhears, are prohibited from disclosure pursuant to section 108A-7. However, there is no similar prohibition on records that were generated independently of the overhear but are not under court seal, such as the arrest report or other investigatory records. These types of records, which do not detail the contents of the overhear, are outside the scope of article 108 of the Criminal Code.

In addition, we find no support for the Sheriff's Office's assertion that the records generated independently of the overhear are exempt in their entirety under section 7(1)(c) or section 7(1)(d)(v). Although victim and witness information may be redacted under section

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7(1)(c), nothing in those records reveals any unique or specialized techniques that would exempt the records pursuant to section 7(1)(d)(v).

Accordingly, we conclude that pursuant to section 7(1) (a) of FOIA, the Sheriff's Office may properly withhold records presently under court seal pursuant to sections 108A-2 and 108A-7 of the Code of Criminal Procedure. The Sheriff's Office, however, is directed to disclose to Mr. Janssen any records that were generated independently of the overhear, subject only to permissible redactions, if any.⁷

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence shall serve to close this matter. If you have any questions, you may contact me at (312) 814-5383.

⁷The Sheriff's Office may redact "private information under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)). The Sheriff's office may also redact "personal information" under section 7(1)(c) (5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)), which exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

Finally, the Sheriff's Office may also redact information under section 7(1)(d)(iv) (5 ILCS 140/7(1)(d)(iv) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)) which exempts from inspection and copying information that would "[u]navoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request[.]"

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Very truly yours,

Matthew C. Rogina
by AC

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